

**Steve Leimberg's Asset Protection Planning
Email Newsletter Archive Message #360**

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Subject: Steve Oshins on *Toni 1 Trust v. Wacker* - DAPT Fraudulent Transfer Statutes Not Exclusive, But Yet Again No Discussion about Whether Non-Resident Can Use a DAPT

“Toni 1 Trust v. Wacker addresses one primary issue: Which state’s fraudulent transfer rules apply when the fraudulent transfer issue is litigated in another state’s court?”

The conclusion reached by the Supreme Court of Alaska isn’t surprising. This issue hadn’t yet been directly addressed and the Court’s holding should have been expected, especially in light of the Tennessee Coal analysis and holding. Any plaintiff’s attorney would have certainly brought a fraudulent transfer action under the local state’s fraudulent transfer statute if the attorney is aware of the best methods to attack such a trust.”

In [*Toni 1 Trust v. Wacker, 2018 WL 1125033 \(Alaska, Mar. 2, 2018\)*](#), the Supreme Court of Alaska ruled on an Alaska statute purporting to grant the State of Alaska exclusive jurisdiction over fraudulent transfer actions against an Alaska trust. The Court ruled that it cannot.

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Steve authors three different annual state rankings charts and one state income tax chart:

- [The Annual Domestic Asset Protection Trust State Rankings Chart](#)

- [The Annual Dynasty Trust State Rankings Chart](#)
- [The Annual Trust Decanting State Rankings Chart](#)
- [The Annual Non-Grantor Trust State Income Tax Chart](#)

Now, here is Steve Oshins' commentary:

EXECUTIVE SUMMARY:

LISI Commentator **Jay Adkisson** wrote about this case in [Asset Protection Planning Newsletter #359](#) (March 5, 2018). However, I read the case very differently. I will not restate the facts since Jay did a good job in that regard and because this newsletter is focused on the bottom line results more so than the detailed facts.

COMMENT:

The Supreme Court of Alaska ruled on an Alaska statute purporting to grant the State of Alaska exclusive jurisdiction over fraudulent transfer actions against an Alaska Domestic Asset Protection Trust ("DAPT"). The Court ruled that it cannot. The specific statute is Alaska Statute 34.40.110(k) which provides in part that Alaska courts have "exclusive jurisdiction over an action brought under a cause of action or claim for relief that is based on a transfer of property to a [self-settled spendthrift] trust" — a class that obviously includes fraudulent transfer actions."

The Court focused its discussion on an older case, [Tennessee Coal, Iron, & R.R. Co. v. George, 233 U.S. 354, 360 \(1914\)](#). The *Tennessee Coal* court held that the Full Faith and Credit Clause does not compel states to follow another state's statute claiming exclusive jurisdiction over suits based on a cause of action "even though [the other state] created the right of action."

Which State's Fraudulent Transfer Rules Apply?

Toni 1 Trust v. Wacker addresses one primary issue: Which state's fraudulent transfer rules apply when the fraudulent transfer issue is litigated in another state's court?

The conclusion reached by the Supreme Court of Alaska isn't surprising. This issue hadn't yet been directly addressed and the Court's holding should have been expected, especially in light of the *Tennessee Coal*

analysis and holding. Any plaintiff's attorney would have certainly brought a fraudulent transfer action under the local state's fraudulent transfer statute if the attorney is aware of the best methods to attack such a trust.

Does this new case mean that every court will rule as such? Probably. However, not with 100% certainty. The holding and analysis (left out of this newsletter) is compelling, but each other court may analyze it differently or find additional facts that swing the decision one way or the other.

What does this New Case Actually Mean for Out-of-State DAPTs?

Assuming other courts follow this result, it essentially takes away much of the advantage of a DAPT set up in a state with a more favorable statute of limitations. It's that simple.

Does this mean that it doesn't matter anymore whether the chosen DAPT jurisdiction has a short or long statute of limitations? In other words, is a DAPT jurisdiction with a two-year statute of limitations superior or only equivalent to a DAPT set up under the laws of a jurisdiction with a four-year statute? [This analysis, of course, does not factor in other features of the chosen jurisdiction.]

Asset protection planning is in large part based on the "fear factor". It's often about structuring one's assets so that a future creditor is scared that collectability will be difficult. Quick and cheap settlements are preferred to long, expensive trials. A DAPT jurisdiction with a two-year statute of limitations is and always will be [or will at least appear to be] scarier to a creditor than one with a four-year statute where the transfer is past the two-year period, but not past the four-year period.

Only where one assumes that the plaintiff's litigation attorney is familiar with each and every way to bust through the structure do some of these cases sometimes level the playing field for the creditor. This is why using an expert trust litigator who is familiar with case law of national interest provides an incredible advantage to the creditor.

Toni 1 Trust v. Wacker: Alaska Law vs. Montana Law

Regardless of the holding in this case, the transfers were made after the judgment was entered anyway. Therefore, this was such a blatant fraudulent transfer (under the laws of any state's fraudulent transfer

statutes) that the parties in this case would end up in nearly the same position regardless of the holding on this particular issue.

In other words, had Alaska's statute applied, this was still a fraudulent transfer. Query whether the trust and transfer work was done by an attorney. If so, what was the attorney thinking when taking this case on? One can only wonder what the Affidavit of Solvency said.

Hybrid DAPTs are So Much Better than Regular DAPTs Anyway

I have written about Hybrid DAPTs for [LISI](#) in the past. Essentially, a Hybrid DAPT is a third-party trust in which a person sets the trust up for the benefit of the settlor's spouse and the descendants. A Trust Protector can be added who has the power to add and remove beneficiaries, including adding the settlor (and removing the settlor).

Only in an extreme emergency will the settlor ever actually be added as a beneficiary. And only if the coast is clear. As long as the settlor isn't added, the trust is a third-party trust that isn't susceptible to the traditional DAPT attacks.

Even though regular DAPTs have enjoyed nearly an unblemished record [See "fear factor" analysis above], still, why, why, why do planners continue to set up regular DAPTs for residents of non-DAPT states? Why take the risk if there is a more protective alternative? Certainly, in some situations, there is no viable option or the client makes the choice to take the added risk, but still, that should be the small minority of such trusts.

Summary

This case deals with the question of whether a DAPT jurisdiction can exclusively apply its fraudulent transfer statutes even when the litigation occurs in another state's court. This Court ruled that it can't.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Steve Oshins

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